U.S. Department of Justice

Immigration and Naturalization Service

[redacted]

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 98 089 53365 Office: CALIFORNIA SERVICE CENTER Date: FEB 29 2000

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a company involved in trading, investment, and property management. It seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established its financial ability to pay the proffered wage. The director also determined that the petitioner had not established that the United States corporation and the foreign entity shared a qualifying relationship.

On appeal, counsel presents a brief and additional evidence.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a

statement must clearly describe the duties to be performed by the alien.

8 C.F.R. 204.5(g)(2) states, in pertinent part, that any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In Elatos Restaurant Corp., etc. v. Sava, 632 F. Supp. 1049 (S.D.N.Y. 1986), the court held the Service could rely on income tax returns as a basis for determining a petitioner's ability to pay the proffered wage. Further, in K.C.P. Food Co., Inc. v. Sava, 623 F. Supp. 1080 (S.D.N.Y. 1985), the court held the Service had properly relied on the petitioner's corporate income tax returns in finding the petitioner could not pay the proffered wage. The court rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, the court found the petitioner must establish its ability to pay the proffered wage at the time the petition is filed, not at the time of the actual adjudication. See Chi-Feng Chang v. Thornburgh, 719 F. Supp. 532 (N.D. Texas 1989).

The petition to classify the beneficiary as a multinational executive or manager was filed with the Service on February 4, 1998. The petitioner must show that it has had the ability to pay the proffered wage since that date.

The beneficiary's salary as stated on the I-140 petition is $36,000 per year. As evidence of its ability to pay the proffered wage, counsel submitted the petitioner's Form 1120 U.S. Corporation Income Tax Return for the fiscal year October 1, 1995 through September 30, 1996. The federal tax return reflected gross receipts of $270,456; gross profit of $270,456; compensation of officers of $0; salaries and wages of $95,172; depreciation of $10,159; and taxable income before net operating loss deduction and special deductions of $34,397. Schedule L reflected current assets of $24,375 of which $23,375 was in cash and current liabilities of $16,046.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage at the time of filing. On July 9, 1998, the director requested additional evidence of the petitioner's ability to pay the proffered wage as of January 1, 1996 and continuing to present.

In response, counsel for the petitioner submitted copies of the petitioner's bank statements for the period January 1, 1996

through August 31, 1998 and a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for the fiscal year October 1, 1996 through September 30, 1997. The federal tax return reflected gross receipts of $335,162; gross profit of $335,162; compensation of officers of $0; salaries and wages of $100,907; depreciation of $14,795; and taxable income before net operating loss deduction and special deductions of -$3,601. Schedule L reflected current assets of $58,447 of which $57,737 was in cash and current liabilities of $22,353.

The director determined that the additional evidence submitted did not establish that the petitioner had the ability to pay the proffered wage at the time of filing of the petition and denied the petition accordingly.

On appeal, counsel submits another copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for the fiscal year October 1, 1995 through September 30, 1996; another copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for the fiscal year October 1, 1996 through September 30, 1997; and a copy of the petitioner's Form 1120-A U.S. Corporation Short-Form Income Tax Return for the fiscal year October 1, 1997 through September 30, 1998. The federal tax return for the fiscal year October 1, 1997 through September 30, 1998 reflects gross receipts of $384,594; gross profit of $384,594; compensation of officers of $0; salaries and wages of $124,548; depreciation of $22,977; and taxable income before net operating loss deduction and special deductions of $39,681. Part III reflects current assets of $22,047 of which $7,427 was in cash and current liabilities of $17,110.

Counsel states that the director erroneously reviewed the petitioner's income tax returns for the fiscal years ended September 30, 1994 through September 30, 1997 and that the director mischaracterized the company's operating losses as proof of its imminent demise. Counsel asserts that the director failed to recognize the petitioner's increase in assets and amount of depreciation deductions as reported on its income tax returns.

A review of the federal tax return for fiscal year October 1, 1995 through September 30, 1996 shows that when one adds the taxable income, the depreciation, and the cash on hand at year end (to the extent that assets exceeded liabilities), the result is $52,885, more than enough to pay the proffered wage.

A review of the federal tax return for fiscal year October 1, 1996 through September 30, 1997 shows that when one adds the taxable income, the depreciation, and the cash on hand at year end (to the extent that assets exceeded liabilities), the result is $47,288, again more than enough to pay the proffered wage.

A review of the federal tax return for fiscal year October 1, 1997 through September 30, 1998 shows that when one adds the

taxable income, the depreciation, and the cash on hand at year end (to the extent that assets exceeded liabilities), the result is $67,595, still more than enough to pay the proffered wage.

Therefore, the petitioner has demonstrated its ability to pay the proffered wage as of the date the priority date was established and continuing to the present.

The remaining issue that must be addressed is whether the United States corporation and the foreign entity share a qualifying relationship.

Service regulations at 8 C.F.R. 204.5(j)(2) state, in pertinent part, that:

> *Affiliate* means: (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity....
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

Regulations at 8 C.F.R. 204.5(j)(3)(D) require that the petition be accompanied by evidence that demonstrates that the prospective United States employer has been doing business for at least one year.

The petitioning company, Clanlaw Corporation, seeks to employ the beneficiary as its president and chief executive officer. The director concluded in her decision that the United States entity and the foreign entity were separate business entities. The director stated that the two entities are not two subsidiaries both of which are owned and controlled by the same parent or individual and the two entities are not two legal entities owned and controlled by the same group of individuals with each individal owning and controlling approximately the same share or proportion of each entity.

On appeal, counsel cites Matter of Siemens Medical Systems, Inc., 19 I&N 362 (1986) and states, in pertinent part:

In the case at bar, Mr. [redacted] had power and control to prevent any action by the Taiwan company based upon his ownership of 50% of Clanlaw Taiwan's shares. Even if all the other shareholders voted against Mr. [redacted] he held veto power to stop any action by the shareholders. As such, Mr. [redacted] did in fact control the foreign entity, and therefore, Clanlaw Taiwan and Clanlaw USA qualify as affiliated companies through the common ownership and control of Mr. [redacted]

Furthermore, as indicated on the Changing Registration dated November 13, 1998, [redacted] went through a corporate reorganization whereby additional shares were issued and the ownership of [redacted] is as follows:

[redacted]

NT$	2,750,000.00
NT$	1,000,000.00
NT$	500,000.00
NT$	500,000.00
NT$	250,000.00

Therefore, Mr. [redacted] is the majority and controlling shareholder of [redacted] with 55 percent of the outstanding shares. Accordingly, [redacted] and [redacted] are affiliated companies through the common ownership and control by Mr. [redacted]

Counsel's argument is not persuasive. Unlike the present case, Matter of Siemen's Medical Systems, Inc., supra, deals with three companies where each of two corporations (parents) owns and controls 50% of a third corporation (joint venture). The joint venture, then, is a subsidiary of each of the parents.

In the present case, although some common ownership exists between the two companies, they do not meet the definition of affiliate, as they are not owned by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be *de jure* by reason of ownership of 51 per cent of outstanding stocks of the other entity or it may be *de facto* by reason of control of voting shares through partial ownership and by possession of proxy votes. Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982).

Counsel asserts that due to a reorganization of Clanlaw Taiwan on November 13, 1998, the beneficiary now owns 55% of the foreign entity and, thus, is the majority and controlling shareholder of Clanlaw Taiwan. While this may be true at present, eligibility for benefits sought must be established at the time of filing of the petition. In this case, as of February 4, 1998.

8 C.F.R. 204.5(j)(2), cited above, states that a qualifying relationship exists when two entities are "owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity." In this case, the petitioner has not demonstrated a qualifying relationship exists between the U.S. and foreign entities.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.